

NTSB Order No.  
EM. 96

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 7th day of April, 1982

JOHN B. HAYES, Commandant, United States Coast Guard,

v.

HUGH M. MALANAPHY, Appellant.

Docket No. ME-89

ORDER DENYING RECONSIDERATION

By Order EM-95, served January 19, 1982, we denied the Coast Guard's motion to dismiss this proceeding for appellant's failure to file a brief in support of his appeal within 20 days after filing his notice of appeal.<sup>1</sup> We found that respondent's explanation for not filing his brief on time demonstrated good cause for allowing him to file it out of time. We therefore accepted the appeal brief he had tendered and extended, for a period of 30 days, the Coast Guard's time within which to file a reply brief.

Instead of filing a reply, however, the Coast Guard has submitted a request that we reconsider our denial of its motion to dismiss. The Coast Guard contends in effect that appellant's belief that perjured testimony may have affected his hearing on the charge of misconduct was not adequately substantiated in his opposition to the motion to dismiss and, in any event, his efforts to obtain proof that such testimony was presented would not have precluded a timely request for an extension of time to file his appeal brief. In sum, the Coast Guard does not believe appellant had established good cause for a delay in filing his brief.

The decision to accept appellant's brief and thereby allow his appeal to proceed to a resolution on its merits rather than to terminate it on the basis of a procedural flaw reflects an exercise of administrative discretion which the Coast Guard has not shown was erroneous in any respect. It is thus not subject to reconsideration because a different conclusion could have been

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<sup>1</sup>See Rule 20(a), 49 CFR 825.20(a).

reached as to the sufficiency of the showing on which good cause for the late filing was predicated.

ACCORDINGLY, IT IS ORDERED THAT:

1. The request for reconsideration of Order EM-95 is denied;  
and
2. The unopposed request for an additional extension of time until 30 days after service of this order within which to file a reply brief is granted.

McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above order. BURNETT, Chairman, disapproved.